

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 21

Docket No. DC-0752-11-0145-I-1

**Sarel Solis,
Appellant,**

v.

**Department of Justice,
Agency.**

February 28, 2012

Michael Meyrick, Esquire, Canon City, Colorado, for the appellant.

Jason Laeser, Esquire, and Leslie K. Schumacher, Esquire, Springfield, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has petitioned for review of an initial decision that affirmed his removal. For the reasons set forth below, we REVERSE the initial decision and order the agency to CANCEL the appellant's removal.

BACKGROUND

¶2 Prior to his removal, the agency employed the appellant as a Criminal Investigator, GS-13. Initial Appeal File (IAF), Tab 4, Subtab 4b. On September 10, 2009, the agency proposed to suspend the appellant for a period of 7 calendar

days based upon the sole charge of “Poor Judgment” pursuant to the results of an investigation by the agency’s Office of Professional Responsibility (OPR). IAF, Tab 4, Subtab 4l. The agency subsequently rescinded the proposal to suspend and, on March 4, 2010, issued a proposal to remove the appellant from federal service based upon two charges: one specification of “Conduct Unbecoming a DEA Special Agent” and two specifications of “Making False Statements.” IAF, Tab 4, Subtab 4i. The conduct alleged in the September 10, 2009 proposal to suspend formed the basis for the conduct unbecoming charge as well as the first specification of the false statements charge. IAF, Tab 4, Subtabs 4i, 4l. The second specification of the false statements charge contained new allegations regarding the same underlying conduct. *Id.*

¶3 Following consideration of the appellant’s written reply, IAF, Tab 4, Subtab 4e, the deciding official, Larry Reavis, sustained the charges and specifications, and issued a decision informing the appellant that he was removed effective upon the date he received the decision letter, which was October 20, 2010, IAF, Tab 4, Subtabs 4b, 4c.

¶4 The appellant filed a timely Board appeal, alleging that the charges should not be sustained, the agency did not establish nexus, and the penalty of removal was unreasonable. IAF, Tab 1 at 5. The appellant also claimed that the agency committed harmful procedural error in effecting the removal and that the removal should be barred by the doctrine of laches. IAF, Tab 13 at 1. In support of his harmful procedural error claim, the appellant argued that, in deciding to remove him, Reavis improperly considered that the appellant’s misconduct might have been criminal, and that it might raise *Giglio* issues,¹ despite the fact that neither

¹ Under *Giglio v. United States*, [405 U.S. 150](#) (1972), investigative agencies must turn over to prosecutors, as early as possible in a case, any potential impeachment evidence concerning the agents involved in the case. The prosecutor will then exercise his discretion regarding whether the impeachment evidence must be turned over to the defense. A “*Giglio*-impaired” agent is one against whom there is potential impeachment evidence that would render the agent’s testimony of marginal value in a

of those considerations was identified in the proposed removal notice. IAF, Tab 14 at 6. In support of his claim that the agency's removal should be barred by the doctrine of laches, the appellant argued that he was prejudiced by the 34-month delay between his actions on January 9, 2008, and his removal on October 20, 2010. *Id.* at 9. After holding the requested hearing, the administrative judge issued an initial decision, finding that the agency established its charges by preponderant evidence, that the appellant failed to establish his affirmative defenses of harmful procedural error and laches, and that the penalty of removal was reasonable. IAF, Tab 35 (Initial Decision).

¶5 The appellant has filed a petition for review. Petition for Review File (PFR File), Tab 1. The agency has filed a response in opposition. PFR File, Tab 3.

ANALYSIS

¶6 On review, the appellant argues, *inter alia*, that the administrative judge erred when she determined that the appellant failed to establish his affirmative defense of harmful procedural error, especially with respect to his argument that the deciding official improperly relied on *Giglio* issues in sustaining his removal. PFR File, Tab 1 at 23-26. However, we find that the appellant's argument with respect to the agency's consideration of *Giglio* issues is properly analyzed first as a claim that the agency denied him minimum due process. *See Silberman v. Department of Labor*, [116 M.S.P.R. 501](#), ¶¶ 4-8 (2011).

¶7 When an agency intends to rely on aggravating factors as the basis for the imposition of a penalty, such factors should be included in the advance notice of adverse action so that the employee will have a fair opportunity to respond to those factors before the agency's deciding official. *Lopes v. Department of the*

case. Thus, a case that depends primarily on the testimony of a *Giglio*-impaired witness is at risk. *See Hathaway v. Department of Justice*, [384 F.3d 1342](#), 1349 (Fed. Cir. 2004).

Navy, [116 M.S.P.R. 470](#), ¶ 5 (2011). Our reviewing court has explained that, if an employee has not been given “notice of any aggravating factors supporting an enhanced penalty,” an ex parte communication with the deciding official regarding such factors may constitute a constitutional due process violation because it potentially deprives the employee of notice of all the evidence being used against him and the opportunity to respond to it. *Ward v. U.S. Postal Service*, [634 F.3d 1274](#), 1280 (Fed. Cir. 2011). Furthermore, in determining whether a due process violation has occurred, there is no basis for distinguishing between ex parte information provided to the deciding official and information personally known by the deciding official, if the information was considered in reaching the decision and not previously disclosed to the appellant. *Lopes*, [116 M.S.P.R. 470](#), ¶¶ 10-13.

¶8 However, not every ex parte communication rises to the level of a due process violation; only ex parte communications that introduce new and material information to the deciding official constitute due process violations. *Stone v. Federal Deposit Insurance Corporation*, [179 F.3d 1368](#), 1376 (Fed. Cir. 1999). The question is whether the ex parte communication is “so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances.” *Ward*, 634 F.3d at 1279 (citations omitted). The Board will consider the following factors, among others, to determine whether an ex parte contact is constitutionally impermissible: (1) whether the ex parte communication merely introduces “cumulative” information or new information; (2) whether the employee knew of the information and had a chance to respond to it; and (3) whether the ex parte communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. *See Blank v. Department of the Army*, [247 F.3d 1225](#), 1229 (Fed. Cir. 2001). A due process violation is not subject to the harmful error test; instead, the employee is automatically entitled to a new constitutionally correct removal proceeding. *Ward*, 634 F.3d at 1279.

¶9 Here, the agency did not provide the appellant notice regarding *Giglio* issues in the notice of proposed removal. IAF, Tab 4, Subtab 4i. In his written evaluation of the penalty determination factors set forth in *Douglas v. Veterans Administration*, [5 M.S.P.R. 280](#), 305-06 (1981), however, the deciding official listed the appellant's *Giglio* issues as an aggravating factor in assessing the removal penalty, which contributed in part to his finding that the appellant had no potential for rehabilitation. IAF, Tab 20, Exhibit 7 at 11-12. In so finding, the deciding official observed that the appellant's attorney failed to set forth any arguments in the appellant's written reply to the proposal notice to explain how the agency would overcome the *Giglio* issues facing the appellant, despite the agency's failure to provide him proper notice of this matter. *Id.* The deciding official's hearing testimony corroborated his written evaluation of the *Douglas* factors. Hearing Transcript at 146, 152-53, 156.

¶10 The agency's reliance on *Giglio* issues in imposing the appellant's removal without providing him notice and an opportunity to respond to those issues cannot fairly be deemed cumulative or immaterial to the deciding official's decision. *See Stone*, 179 F.3d at 1376-77. Thus, the agency violated the appellant's due process rights by denying him notice of the specific information considered and an opportunity to respond. *See Silberman*, [116 M.S.P.R. 501](#), ¶ 14; *see also Gray v. Department of Defense*, [116 M.S.P.R. 461](#), ¶¶ 9-13 (2011) (finding that a *Ward* due process violation occurred when the deciding official considered the appellant's likely loss of eligibility for a sensitive position as an aggravating factor without notice to the appellant). Consequently, because the agency violated the appellant's due process rights, the appellant's removal must be reversed and he must be afforded a "new constitutionally correct removal

procedure.”² *Ward*, 634 F.3d at 1280. Based on our disposition, we need not address the appellant’s other arguments on review.

ORDER

¶11 We ORDER the agency to CANCEL the appellant's removal and to restore the appellant effective October 20, 2010. *See Kerr v. National Endowment for the Arts*, [726 F.2d 730](#) (Fed. Cir. 1984). The agency must complete this action no later than 20 days after the date of this decision.

¶12 We also ORDER the agency to pay the appellant the correct amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management’s regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to calculate the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it carry out the Board’s Order. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to pay the appellant the undisputed amount no later than 60 calendar days after the date of this decision.

¶13 We further ORDER the agency to tell the appellant promptly in writing when it believes it has fully carried out the Board's Order and to describe the actions it took to carry out the Board’s Order. The appellant, if not notified, should ask the agency about its progress. *See* [5 C.F.R. § 1201.181\(b\)](#).

¶14 No later than 30 days after the agency tells the appellant that it has fully carried out the Board’s Order, the appellant may file a petition for enforcement with the office that issued the initial decision in this appeal if the appellant believes that the agency did not fully carry out the Board’s Order. The petition should contain specific reasons why the appellant believes that the agency has not

² In ordering the agency to cancel the appellant's removal, we make no findings with respect to the merits of the agency's charges.

fully carried out the Board's Order, and should include the dates and results of any communications with the agency. [5 C.F.R. § 1201.182\(a\)](#).

¶15 For agencies whose payroll is administered by either the National Finance Center of the Department of Agriculture (NFC) or the Defense Finance and Accounting Service (DFAS), two lists of the information and documentation necessary to process payments and adjustments resulting from a Board decision are attached. The agency is ORDERED to timely provide DFAS or NFC with all documentation necessary to process payments and adjustments resulting from the Board's decision in accordance with the attached lists so that payment can be made within the 60-day period set forth above.

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) ([5 C.F.R. § 1201.113\(c\)](#)).

NOTICE TO THE APPELLANT
REGARDING YOUR RIGHT TO REQUEST
ATTORNEY FEES AND COSTS

You may be entitled to be paid by the agency for your reasonable attorney fees and costs. To be paid, you must meet the requirements set out at Title 5 of the United States Code (5 U.S.C.), sections 7701(g), 1221(g), or 1214(g). The regulations may be found at [5 C.F.R. §§ 1201.201](#), 1201.202 and 1201.203. If you believe you meet these requirements, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. You must file your attorney fees motion with the office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.



DFAS CHECKLIST

INFORMATION REQUIRED BY DFAS IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT CASES OR AS ORDERED BY THE MERIT SYSTEMS PROTECTION BOARD

AS CHECKLIST: INFORMATION REQUIRED BY IN ORDER TO PROCESS PAYMENTS AGREED UPON IN SETTLEMENT
CASES

CIVILIAN PERSONNEL OFFICE MUST NOTIFY CIVILIAN PAYROLL OFFICE VIA COMMAND LETTER WITH THE FOLLOWING:

1. Statement if Unemployment Benefits are to be deducted, with dollar amount, address and POC to send.
2. Statement that employee was counseled concerning Health Benefits and TSP and the election forms if necessary.
3. Statement concerning entitlement to overtime, night differential, shift premium, Sunday Premium, etc, with number of hours and dates for each entitlement.
4. If Back Pay Settlement was prior to conversion to DCPS (Defense Civilian Pay System), a statement certifying any lump sum payment with number of hours and amount paid and/or any severance pay that was paid with dollar amount.
5. Statement if interest is payable with beginning date of accrual.
6. Corrected Time and Attendance if applicable.

ATTACHMENTS TO THE LETTER SHOULD BE AS FOLLOWS:

1. Copy of Settlement Agreement and/or the MSPB Order.
2. Corrected or cancelled SF 50's.
3. Election forms for Health Benefits and/or TSP if applicable.
4. Statement certified to be accurate by the employee which includes:
 - a. Outside earnings with copies of W2's or statement from employer.
 - b. Statement that employee was ready, willing and able to work during the period.
 - c. Statement of erroneous payments employee received such as; lump sum leave, severance pay, VERA/VSIP, retirement annuity payments (if applicable) and if employee withdrew Retirement Funds.
5. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.



NATIONAL FINANCE CENTER CHECKLIST FOR BACK PAY CASES

Below is the information/documentation required by National Finance Center to process payments/adjustments agreed on in Back Pay Cases (settlements, restorations) or as ordered by the Merit Systems Protection Board, EEOC, and courts.

1. Initiate and submit AD-343 (Payroll/Action Request) with clear and concise information describing what to do in accordance with decision.
2. The following information must be included on AD-343 for Restoration:
 - a. Employee name and social security number.
 - b. Detailed explanation of request.
 - c. Valid agency accounting.
 - d. Authorized signature (Table 63)
 - e. If interest is to be included.
 - f. Check mailing address.
 - g. Indicate if case is prior to conversion. Computations must be attached.
 - h. Indicate the amount of Severance and Lump Sum Annual Leave Payment to be collected. (if applicable)

Attachments to AD-343

1. Provide pay entitlement to include Overtime, Night Differential, Shift Premium, Sunday Premium, etc. with number of hours and dates for each entitlement. (if applicable)
2. Copies of SF-50's (Personnel Actions) or list of salary adjustments/changes and amounts.
3. Outside earnings documentation statement from agency.
4. If employee received retirement annuity or unemployment, provide amount and address to return monies.
5. Provide forms for FEGLI, FEHBA, or TSP deductions. (if applicable)
6. If employee was unable to work during any or part of the period involved, certification of the type of leave to be charged and number of hours.
7. If employee retires at end of Restoration Period, provide hours of Lump Sum Annual Leave to be paid.

NOTE: If prior to conversion, agency must attach Computation Worksheet by Pay Period and required data in 1-7 above.

The following information must be included on AD-343 for Settlement Cases: (Lump Sum Payment, Correction to Promotion, Wage Grade Increase, FLSA, etc.)

- a. Must provide same data as in 2, a-g above.
- b. Prior to conversion computation must be provided.
- c. Lump Sum amount of Settlement, and if taxable or non-taxable.

If you have any questions or require clarification on the above, please contact NFC's Payroll/Personnel Operations at 504-255-4630.